

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
2 State of California
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5
6 BEFORE THE LABOR COMMISSIONER
7 OF THE STATE OF CALIFORNIA
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9

10 HILARIO MIRAVALLES,)	Case No. TAC 33-99
Petitioner,)	
11 vs.)	DETERMINATION OF
)	CONTROVERSY
)	
12 ARTISTS, INC.,)	
)	
13 Respondent.)	
)	
)	

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16 **INTRODUCTION**

17 The above-captioned petition was filed on September 3,
18 1999 by HILARIO MIRAVALLES (hereinafter "Petitioner" or
19 "MIRAVALLES"), alleging that ARTISTS, INC., operated by Vice
20 President, Thad Weinlein, (hereinafter "Respondent" or "Weinlein"),
21 acted as an unlicensed talent agency in violation of Labor Code
22 §1700.5¹. Petitioner seeks a determination from the Labor
23 Commissioner voiding a 1997 written agreement *ab initio*, and seeks
24 disgorgement of all consideration collected by respondent stemming
25 from this agreement.

26 ¹ All statutory citations will refer to the California Labor Code unless
27 otherwise specified.

1 Respondent was served with a copy of the petition on
2 September 28, 1999. Respondent filed his answer with this agency
3 on October 29, 1999, defending on the position that the respondent
4 did not act an agent, but rather acted as an employer and is
5 therefore not subject to the jurisdiction of the Labor
6 Commissioner. A hearing was scheduled and commenced before the
7 undersigned attorney, specially designated by the Labor
8 Commissioner to hear this matter on March 31, 2000, in Los Angeles,
9 California. Petitioner was present and represented by Stuart
10 Libicki of Schwartz, Steinsapir, Dohrmann & Sommers LLP;
11 Respondent did not appear personally but was represented through
12 his attorney, Alan M. Brunswick of Manatt Phelps Phillips. Post
13 trial briefs were submitted on June 5, 2000.

14 Due consideration having been given to the testimony,
15 documentary evidence, arguments and briefs presented, the matter
16 was taken under submission. The Labor Commissioner adopts the
17 following determination of controversy.

18
19 **FINDINGS OF FACT**
20

21 1. Hilario Miravalles was born, lived and educated in
22 the Philippines. In or around June of 1997, the respondent's Vice
23 President, Thad Weinlein, flew to the Philippines in an effort to
24 locate experienced animated artists². Respondent would lure

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26 ² The petitioner's expertise as an animated artist includes working on
27 background and character design for animated motion pictures, (i.e. "The Rugrats
 Movie").

1 artists back to the United States with promises of higher pay.

2 2. Respondent did not own an animation production
3 company himself but rather acted as a broker of artists.
4 Respondent would attempt to find an animation production company in
5 need of artists and then subcontract his workers out to a third-
6 party production company. Irrespective of the compensation
7 negotiated with the production company, the artist would receive a
8 first-year \$40,000.00 salary, pro-rated based upon the duration of
9 employment respondent was able to obtain. In other words, the
10 artist was "on-call" and would be paid only for time actually
11 worked.

12 3. Petitioner, a college graduate with extensive
13 experience in background layout animation successfully passed
14 respondents aptitude tests and was offered a job in the United
15 States, including travel expenses. On June 30, 1997, the parties
16 entered into a written agreement titled, "Employment Agreement."
17 The terms of the agreement provided for an initial three (3) years,
18 with a first year salary of \$40,000.00, coupled with two (2), two
19 (2) year options. Respondent secured an H-1B Visa³ for the
20 petitioner who was then transported to the United States to begin
21 work.

22 4. In September of 1997 through early May 1998,
23 respondent began work with Klasky Csupo, Inc., for the production
24

25 ³ Sect 214(g) of the Immigration and Nationality Act provides that an
26 H-1B Visa is required of an alien who will be employed in a specialty occupation
27 of distinguished merit that requires theoretical and practical application of a
body of specialized knowledge and attainment of a bachelor's or higher degree in
the specific specialty. This is a minimum for entry into the United States.

1 of the "The Rugrats Movie." After "The Rugrats Movie" was completed,
2 petitioner was laid off. Petitioner was next assigned to work at
3 Baer Animation which lasted approximately three weeks and ended on
4 May 31, 1998. During the next four months, respondent
5 unsuccessfully attempted to locate work for the petitioner.

6 5. In October of 1998, after four months of
7 unemployment, petitioner began to look for work himself.
8 Petitioner interviewed with Rough Draft Studios and was promptly
9 hired in October of 1998 with an annual salary of \$62,400.00 based
10 on a similar pro-rated formula. Miravalles enjoyed uninterrupted
11 employment for the next several months.

12 6. In or around mid December 1998, Rough Draft Studios
13 Senior Vice President, Claudia Katz, received a phone call from
14 Thad Weinlein. Weinlein explained that he was petitioner's "agent"
15 and as his "agent" he would require reimbursement for petitioner's
16 travel expenses and 20% of petitioner's earnings. Weinlein later
17 reconsidered his request and stated he would forego the 20% and
18 travel expenses if Katz would agree to hire respondent's other
19 workers under contract. Katz agreed to consider the proposition.
20 Weinlein then instructed Katz to sign a "Personnel Service
21 Agreement" which provided the terms and conditions governing the
22 relationship between Rough Draft Studios, and Artist's Inc..
23 Notably, provision (A) states, "**Employer (Artists, Inc.) is in the**
24 **business of providing the services of Personnel for theatrical,**
25 **television and commercial productions.**" Katz explained to Weinlein
26 that she would prefer to have her attorney look over the agreement
27 prior to signing. Weinlein's attorney called Katz and barked that

1 he would have the petitioner deported immediately if Katz did not
2 sign the agreement that day. Katz, who found petitioner to be a
3 valuable worker, sought to avoid his deportation and reluctantly
4 signed the agreement after striking a provision she found
5 offensive.

6 7. Under the terms of the agreement between Artist,
7 Inc. and Rough Draft, the payroll and workers' compensation
8 responsibility would be transferred back to Artists Inc..
9 Petitioner continued to be compensated at \$1200.00 per week,
10 although the payroll was now being conducted by Artist, Inc.'s
11 payroll service.

12 8. Over the next several months, Weinlein would call
13 Katz and inquire whether Rough Draft Studios had hired more of
14 Weinlein's workers without his knowledge. Sometime in the early
15 summer of 1999, it was discovered that Katz had unknowingly hired
16 two additional employees under contract to Weinlein. Weinlein
17 again requested a 20% fee for each worker. Weinlein and his
18 attorney threatened a civil lawsuit seeking compensatory damages
19 and immediate deportation of the workers if Katz refused. Katz,
20 unwilling to bear the expense of litigation, paid Weinlein 20% of
21 the worker's wages. To the credit of Rough Draft Studios and Katz,
22 the workers' earnings were unaffected as Rough Draft paid Weinlein
23 20% over and above the worker's current salary. This payment
24 arrangement continued from August 1999 through September 1999. In
25 September of 1999, on advice from counsel, Katz terminated payment
26 to Artists, Inc.. This Petition to Determine Controversy was filed
27 on September 3, 1999.

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CONCLUSIONS OF LAW

1. The Labor Commissioner has jurisdiction to hear and determine controversies, arising between an artist and an agent, pursuant to Labor Code section 1700.44(a).

2. Labor Code §1700.4(b) defines "artists"

"'Artists' means actors and actresses rendering services on the legitimate stage in the production of motion pictures, radio artists, musical artists . . . and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises."

The parties stipulated that petitioner is an artist within the meaning of Labor Code §1700.4(b).

3. The sole issue in this matter is whether the respondent acted as a "talent agent" within the meaning of Labor Code §1700.4(a); or alternatively as an "employer", who is not subject to the Act⁴.

4. Labor Code §1700.40(a) defines "talent agency" as: "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists."

5. The respondent does not dispute petitioner's status as an artist and likewise does not contend that employment was obtained. Instead, the respondent focuses his defense on the fact

⁴ The "Act" refers to the "Talent Agencies Act", Labor Code §§1700 through 1700.47 et. seq., regulating talent agencies and creating protection for those artists seeking employment.

1 that, "[t]his dispute involves an artist-employer relationship ...
2 [and] [a]n employer does not 'procure employment' for its own
3 employees within the meaning of the Act and therefore cannot be a
4 talent agent." Respondent argues that if he acted as an employer,
5 it would be impossible for him to simultaneously act as agent. And
6 if he is not an agent, he could not be subject to the Labor
7 Commissioner's jurisdiction. Respondent cites *Kern v.*
8 *Entertainment Direct*, Case No. TAC 25-96 in support of his theory.
9 *Kern* is distinguishable and therefore does not lend support to
10 respondent's conclusion.

11 6. The respondent in *Kern* provided clowns and magicians
12 to parties and corporate events. The amounts charged to customers
13 were predetermined, as all rates were published in their
14 advertisements. The engagements for the artists in *Kern* were
15 typically for parties, limited to a one-time show, costing
16 approximately \$150.00 per performance. The hearing officer in *Kern*
17 held, "respondents' business did not involve the representation of
18 artists **vis-a-vis third party employers** or the negotiation of
19 artists' compensation [and] . . . By operating its business in
20 this fashion, respondents became the direct employer of the
21 performers, rather than the performers' talent agency." *Kern*
22 *supra.* pg. 7.

23 7. *Kern* is distinguishable in several respects. In
24 *Kern*, unlike petitioner's employment, the engagements were for a
25 very limited time, usually a few hours. Here, the jobs lasted as
26 long as the work was available. In fact, Rough Draft offered
27 employment that spanned over a three year period and these extended

1 employment opportunities were exactly the type of employment
2 respondent sought for his artists. The length of employment
3 between the third-party production company and the artist lends
4 strength to the argument that the production party is the actual
5 employer and not the respondent.

6 8. Moreover, in *Kern*, the hearing officer held that the
7 recipients seeking entertainment were not employers but rather
8 customers and held further that if a customer did not pay the
9 artist for his performance, then the employer/respondent would be
10 ultimately liable for the payment of the artist's wages. The
11 employer would then be forced to seek his compensatory damages for
12 breach of contract against the customer in small claims court.
13 What *Kern* states ostensibly, is that the "economic reality" places
14 the true employer in the position of providing economic viability
15 for the artist and that is where *Kern* deviates from our case.

16 9. In assessing who is ultimately responsible for the
17 payment of wages, or in other words, which party is the petitioner
18 economically dependent on, the terms of the written agreement
19 between Rough Draft and respondent are telling.

20 Section (7) of the "Personnel Services Agreement" entered
21 into between Rough Draft and respondent states,
22 "PRODUCER(Rough Draft) acknowledges and agrees that
23 understanding of and compliance with all applicable state
24 and/or federal wage and hour laws [are] the
25 responsibility of the PRODUCER." Section (8) states,
26 "PRODUCER shall pay EMPLOYER (respondent) . . . all
27 gross wages, allowances, fringe benefits, and other

1 payments as may be required by applicable law."

2 10. These provisions imply that the legal responsibility
3 to follow all relevant laws relating to the payment of wages fall
4 squarely on Rough Draft. Rough Draft is therefore required to
5 provide accurate accounting of hours worked, overtime, provide the
6 legally applicable break and lunch periods and turn those accurate
7 figures over to respondent's payroll service for final calculation.
8 Also, the "Service Schedule"⁵, provides that **payroll is issued on**
9 **check exchange only**. This provision requires respondent to verify
10 Rough Draft's payment to respondent prior to issuing the employees'
11 payroll (emphasis added). The reality of the arrangement is
12 significant because it places Rough Draft as the party ultimately
13 responsible for the payment of wages and consequently is another
14 important factor in creating an employer-employee relationship
15 between petitioner and Rough Draft. Conversely, a "talent agent"
16 is not responsible for reimbursing his artist should the production
17 company refuse to tender payment. Here, by the express terms of
18 respondent's agreement with Rough Draft, respondent would **not be**
19 **responsible for issuing payroll** if Rough Draft failed or refused to
20 first exchange checks with the respondent.

21 11. Additionally, Industrial Welfare Commission (IWC)
22 Order No. 12-80 sec. 2(f), regulating the wages, hours and working
23 conditions in the motion picture industry, defines "employer" as
24 "any person, . . . who directly or indirectly, or through an agent
25 or any other person, employs or exercises control over wages,

26 ⁵ The "Service Schedule" is a one page attachment to the "Personnel
27 Services Agreement", establishing, *inter alia*, the time and amount Rough Draft
was to pay Artist's Inc..

1 hours, or working conditions of any person. In our case, Rough
2 Draft sets the hours of employment, breaks, meal periods and
3 controls every aspect of petitioner's day to day activities.

4 12. In looking at the entertainment industry as a
5 whole, it is without exception the creator of the entertainment
6 product is the employer⁶. Whether film, television, stage,
7 commercials or print modeling the production company is invariably
8 the employer. Rough Draft creates the product and Rough Draft is
9 consequently the petitioner's employer.

10 13. Respondent contends that contrary to an artist-
11 agency relationship, he did not negotiate an employment deal
12 providing the most lucrative terms for the artist and conversely
13 negotiated the terms with prospective employers for his own primary
14 benefit. Again, Kern is distinguished as the employer did not
15 negotiate with third parties. Here, respondent was free to
16 negotiate any compensation terms he chose, consequently this
17 circular argument further establishes respondent's breach of his
18 fiduciary duty toward the artist.

19 14. Now that it is established that the respondent
20 acted as a "talent agent" within the meaning of the Act, we must now
21 determine whether he "procured employment" for the artist. The term
22 "procure", as used in this statute, means to get possession of:
23 obtain, acquire, to cause to happen or be done: bring about."
24 *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 628. Thus "procuring
25 employment" under the statute includes entering into discussions

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27 ⁶ "Independent Contractor" status of the employee was not discussed and is
not relevant to this proceeding.

1 regarding contractual terms with prospective employers that leads
2 to employment. In *Waisbren v. Peppercorn Production, Inc* (1995) 41
3 Cal.App.4th 246, the court held that any single act of procuring
4 employment subjects the agent to the Talent Agencies Act's
5 licensing requirements. Applying *Waisbren*, it is clear respondent
6 "procured employment" within the meaning of Labor Code §1700.4(a).
7 In fact, respondent's sole responsibility was to "procure
8 employment" for artists in the entertainment industry as reflected
9 by respondent's efforts with Klasky Csupo, Inc. and Baer Animation
10 and the express terms of Provision (A) of the "Personal Services
11 Agreement" between Rough Draft and Artists Inc. Respondent's
12 activities fall squarely within the meaning of "procure" and he is
13 therefore subject to the jurisdiction of the Labor Commissioner.

14 15. Labor Code §1700.5 provides that "no person shall
15 engage in or carry on the occupation of a talent agency without
16 first procuring a license therefor from the Labor Commissioner."
17 It was stipulated that the respondent has never been a licensed
18 talent agent.

19 16. Since the clear object of the Act is to prevent
20 improper persons from becoming [talent agents] and to regulate such
21 activity for the protection of the public, a contract between and
22 an unlicensed agent and an artist is void." *Buchwald v. Superior*
23 *Court supra.*; *Waisbren v. Peppercorn supra*, at 261. Under *Civil*
24 *Code section 1667*, contracts that are contrary to express statutes
25 or public policy as set forth in statutes are illegal contracts and
26 the illegality voids the entire contract. The evidence does not
27

1 leave a doubt that respondent procured employment for his artist
2 without possessing a talent agency license. Therefore, the
3 "Employment Agreement" between the parties must fall.

4 17. Respondent also contends that the express terms of
5 the agreement create an employer-employee relationship. In
6 *Buchwald v. Superior Court, supra.* at 347, the court rejected the
7 argument that contractual language established, as a matter of law,
8 the relationship between the parties. The court stated, "the
9 Labor Commissioner is free to search out illegality lying behind
10 the form in which a transaction has been cast for the purpose of
11 concealing such illegality. [citation omitted.] The court will look
12 through provisions, valid on their face, and with the aid of parol
13 evidence, determine that the contract is actually illegal or part
14 of an illegal transaction." As discussed, the facts establish
15 respondent's role as an agent - not an employer - and he is
16 therefore in violation of Labor Code §1700.5.

17
18 **ORDER**

19 1. For the above-stated reasons, IT IS HEREBY ORDERED
20 that the "Employment Agreement" between petitioner, HILARIO
21 MIRAVALLS and ARTISTS, INC., operated by Vice President, Thad
22 Weinlein, is void *ab initio*. The respondent has no further
23 enforceable rights under this contract.

24 2. Having not made a showing that respondent collected
25 profits within the one-year statute of limitations found at Labor
26 Code §1700.44(c), the petitioner is not entitled to a recoupment of
27 profits.

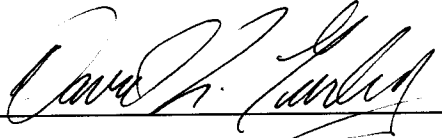
3. The petitioner has obtained a new H-1B Visa through

1 Rough Draft Inc. and is therefor not in danger of deportation.
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3 IT IS SO ORDERED
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7 Dated:

10/11/00

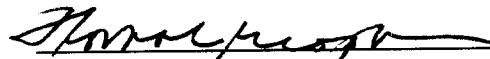


8 DAVID L. GURLEY
9 Attorney for the Labor Commissioner
10

11 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:
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15 Dated:

OCT 11 2000



16 THOMAS GROGAN
17 Assistant Chief
18 to the Labor Commissioner
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STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS - DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL

(C.C.P. §1013a)

HILARIO MIRAVALLES vs. ARTISTS, INC.
SF033-99 TAC33-99

I, Benjamin Chang, do hereby certify that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102.

On October 11, 2000, I served the following document:

DETERMINATION OF CONTROVERSY

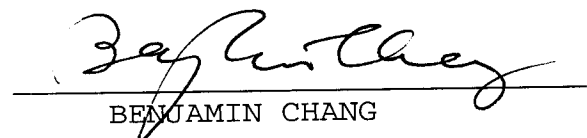
by facsimile and by placing a true copy thereof in envelope(s) addressed as follows:

**ALAN M. BRUNSWICK
ANDREW L. SATENBERG
MANATT, PHELPS & PHILLIPS, LLP
11355 WEST OLYMPIC BLVD.
LOS ANGELES, CA 90064**

**STUART LIBICKI
SCHWARTS, STEINSAPIR, DOHRMANN &
SOMMERS LLP
6300 WILSHIRE BLVD. STE. 2000
LOS ANGELES, CA 90048-5202**

and then sealing the envelope with postage thereon fully prepaid, depositing it in the United States mail in the city and county of San Francisco by ordinary first-class mail.

I certify under penalty of perjury that the foregoing is true and correct. Executed on October 11, 2000, at San Francisco, California.


BENJAMIN CHANG

CERTIFICATION OF SERVICE BY MAIL